

FAIR POLITICAL PRACTICES COMMISSION

Memorandum

To: Chairman Getman and Commissioners Downey, Knox and Swanson

From: C. Scott Tocher, Commission Counsel
Luisa Menchaca, General Counsel

Subject: Proposition 34 - Advertising Disclosure – Adoption of Proposed Regulations 18450, 18450.1 and 18450.2.

Date: June 28, 2002

To implement the advertising disclosure requirements recently enacted by the voters with Proposition 34, the Commission has considered and adopted several regulations. Emergency regulations adopted by the Commission in January of this year sought to establish rules for advertising disclosure by primarily formed ballot measure committees and others in the state primary election in March of 2002. In May of this year, the Commission permanently adopted those regulations, some with slight modification, after examining them in light of the March election. Also at the May meeting, the Commission considered prenotice discussion of three additional regulations and determined to bring them back for consideration for permanent adoption. The Commission also instructed staff to pursue a legislative remedy to address problems with the interpretation of the advertising statutes. This memorandum updates the Commission on that endeavor and proposes regulations for adoption. **The Commission may also choose to delay adoption of some or all of the proposed regulations pending the outcome of the legislative effort.** (The regulations are attached as Exhibit 1.)

I. BACKGROUND

Government Code sections 84501 - 84511¹, added to the Political Reform Act ("Act") by Proposition 208, pertain to the disclosure of major funding sources for campaign advertising. Proposition 34 and Senate Bill 34 further amended these statutes.²

In assessing the regulations, it is helpful to keep in mind the three primary facets of the advertising statutes. **First**, section 84503 requires the disclosure of the top two contributors of \$50,000 in "any advertisement" for or against a ballot measure. (§ 84503, subd. (a).) **Second**, section 84504 requires committees supporting or opposing ballot measures to identify themselves (name identification) in a way that includes the economic interests of their major donors of \$50,000. (§ 84504, subd. (a).) **Third**, section 84506 requires disclosure in an

¹ All statutory references are to the Government Code, unless indicated otherwise.

² For the Commission's convenience, a table of the advertising disclosure statutes is attached as Exhibit 2.

advertisement of the two largest contributors to a committee making an independent expenditure with regard to a candidate or ballot measure.

The Commission in May adopted four regulations (adopted on an emergency basis in January of this year) that address the following primary issues.

- The committee naming requirements are limited to ballot measure committees, as opposed to general purpose committees. (Reg. 18402.) The Commission heard argument, for instance, that application of some of the advertising statutes to candidate-controlled committees would yield absurd or awkward results.
- The Commission decided, both for disclosure and for committee naming purposes, how to define the "economic or other special interest" of committees and large donors. (Reg. 18450.3.) This determination impacts how committees disclose in advertisements the interests of their largest donors and also how committees name themselves (and also whether such must be amended from time to time).
- The Commission decided that committees must use specific language in advertisements to identify their largest contributors that gave significant support to the sponsoring committee. (Reg. 18450.4.)
- The Commission decided the circumstances under which any filings must be amended and the time allotted to do so. (Reg. 18450.5.)

II. THE COMMISSION'S OPTIONS FOR FUTURE ACTION

In addition to adopting the four regulations described above, the Commission in May instructed staff to pursue a legislative amendment to section 84502, defining "cumulative contributions," to remedy a problem with the scope of the statutory scheme. Specifically, the Commission directed staff to pursue an amendment which would make the cumulation period extend not back to the date the committee was created but only 12 months back from the date of the advertisement. The Commission felt this approach provides the best opportunity to fulfill the voters intent and provide the broadest application of section 84503's advertising disclosure requirements. At the same time, the Commission directed staff to bring the regulations back for consideration in July, as presented in May, with certain other changes.

Legal Division and Commission legislative staff identified several legislative vehicles for the amendment. While a specific bill has not been secured for the amending language, staff is communicating with legislative personnel and is hopeful of having a bill in place by the end of the month.

In light of the unresolved nature of the amendment process, the Commission may choose to defer action on regulations 18450 and 18450.2. This approach has the obvious benefit of knowing whether a legislative amendment has been achieved but comes at the cost of a delayed program in place for the November general election. Because regulation 18450.1, defining "advertisement," does not depend on the other two regulations, the Commission could adopt it

even if it postpones action on the other two. Thus, the following options are available for further action:

Option 1: Postpone until August or September adoption of regulations 18450 and 18450.2 pending further development on the legislative amendment to section 84502. Do not, however, postpone consideration of regulation 18450, which may be considered for adoption at this meeting because it is not impacted by the amendment to section 84502.

Option 2: The Commission may adopt the regulations as currently drafted. In doing so, the Commission might be faced with amending the regulations at a later date should a legislative amendment be accomplished subsequent to this adoption.

Option 3: Adopt the regulations in a form that assumes the legislative fix will be achieved. This approach would require the Commission to determine that the present statutory language authorizes such an interpretation even without the proposed legislative amendment to section 84502.

Staff Recommendation: Staff recommends **Option 1 - postpone adoption of regulations 18450 and 18450.2 and adopt regulation 18450.1**. Staff is concerned that it may be premature to adopt regulations based on an assumption of a legislative amendment. With the benefit of at least another month, which still leaves sufficient time for the November election, the Commission will have a clearer picture of the statutory landscape. Moreover, in addition to the Commission-sponsored legislation, Assembly Bill 3051 (Papan) contains amendments to Section 84506, pertaining to independent expenditures. (See July 2002 Legislative Report.) In the event the Commission postpones action on any or all of the proposed regulations, staff will adopt a conservative approach in rendering advice in these areas. It is staff's belief that advising conservatively best protects those affected by the regulations and preserves the Commission's options in the regulatory process.

The discussion below is provided to facilitate a discussion of the regulations should the Commission decide to consider adoption of any or all of the proposed regulations. **Should the Commission decide to follow staff's recommendation above, please proceed to section II(C), below, for consideration of regulation 18450.1.**

II. THE PROPOSED REGULATIONS

A. Regulation 18450 – Scope. Advertisement Disclosure.

This regulation defines the scope of the advertising statutes comprised of sections 84501 through 84510. It is staff's belief that such a regulation would be a helpful reference for the public as to the obligations of certain committees under these statutes. This is especially important given the complicated interrelationships of the statutes.

1. The Scope of Section 84503 – Is it Limited in the Same Manner as Section 84504?

Subdivision (a) of the regulation interprets sections 84503 and 84504 to apply only to primarily formed committees, as that term is defined elsewhere in the Act. The Commission already has decided that section 84504 is limited to primarily formed ballot measure committees. Therefore, the only new issue presented in this subdivision is whether, likewise, section 84503 is limited to primarily formed committees.

To be sure, section 84503 states "any advertisement" regarding a ballot measure must contain the requisite disclosure. Read alone, one may logically conclude that its intended scope is precisely that – to any advertisement by any committee. The justification and authority for a limited interpretation of the statute is virtually identical to that embraced by the Commission when it interpreted the words "any committee" of section 84504 to apply only to primarily formed committees.

Section 84503 states that only those with "cumulative contributions" of \$50,000 or more need be disclosed in ballot measure advertisements. Section 84502 defines "cumulative contributions" as beginning the first day the committee's statement of organization is filed under section 84101. Some recipient committees have been in existence for many years, and may not have amended their statements of organization for quite some time. A literal application of the statute could result in the disclosure of large contributions made many years ago for reasons unrelated to the current advertisement for the current ballot measure. This results in potentially misleading disclosures, actually hiding the identities of the *current* "big money" contributors.³

The Commission is not without options. For instance, the Commission may construe the definition of "cumulative contributions" more narrowly (see *infra*, "C"). Though reluctant at the May meeting to do so, the Commission may also narrowly interpret section 84503. Staff retains its belief that the Commission has the same authority to interpret section 84503 more narrowly so that the purpose of the statute is fulfilled. The Commission is familiar with the legal authority for doing so and that discussion will not be repeated here except to note that this interpretation complies with canons of statutory construction. By limiting the scope of section 84503 to apply only to primarily formed ballot measure committees, awkward results are avoided and the statute is harmonized with other aspects of the Act. Such an interpretation also alleviates the potential need for a regulation defining more narrowly the term "cumulative contributions."

³ For example, consider a general-purpose recipient committee which has been in existence for some time, and which opposed a ballot measure in 1990. A person, X, contributed a large amount (more than \$50,000) to the committee for the 1990 effort. Time passes, and the committee now wants to place a political advertisement for (or against) a current ballot measure. X has not contributed to the committee since 1990, and does not do so now. However, since X's earlier contribution is still the largest disclosable contribution to the committee, X would have to be disclosed on the current advertisements. Not only is this information unhelpful, it may actually be harmful and misleading because it hides the current "big money" contributors from the public and thereby has the potential to defeat the purpose of the statute.

The Commission has indicated an unwillingness, however, to construe section 84503 so narrowly. Instead, the Commission has evinced a desire to construe section 84503 broadly and instead address any potential problems by redefining "cumulative contributions" more narrowly. To accomplish this goal, the Commission would have to amend the proposed language in subdivision (a) to state that section 84503 "applies to any committee as defined under Government Code section 82013." The language with respect to section 84504 would remain the same.

2. Subdivisions (b) and (c) – Independent Expenditure Ads and Slate Mailers.

Subdivision (b) construes the scope of section 84506, which requires disclosure of the two persons making the largest contributions in an advertisement that constitutes an independent expenditure for or against candidates or ballot measures. Put simply, because the statute itself makes clear the period (one year before the election) during which contributions are aggregated, no problems arise when the statute is applied to various committees, even those in existence for many years. Therefore, this regulation interprets section 84506 to apply to any recipient committee. This includes general purpose committees and any other committee that receives contributions totaling \$1,000 or more in a year.

Subdivision (c) conforms the regulation to the recent court decision regarding the application of certain advertising statutes to slate mailers.

B. Regulation 18450.2 – Cumulative Contributions.

As discussed above, section 84503 requires in a ballot measure advertisement a statement identifying any person whose "cumulative contributions" total \$50,000 or more. (§ 84503, subd. (a).) That term is defined to mean the aggregated contributions received by a committee from a source beginning the "first day the statement of organization is filed" and ending within seven days of the time the advertisement is sent out for production. By now, the Commission is well aware from its consideration of the scope of sections 84503 and 84504, the difficulty such a period of aggregation poses. If the Commission decides to interpret section 84503 narrowly (as the Commission already has done with respect to section 84504), then a regulation further defining "cumulative contributions" may be less necessary. In the event the Commission declines to interpret narrowly section 84503, however, the Commission may yet alleviate some of the problems associated with requiring potentially irrelevant or elusive information by interpreting the period during which contributions are aggregated by section 84502. In this event, staff proposes several options in draft regulation 18450.2. *This proposed language assumes a legislative fix is unavailable or unsuccessful.*

The argument for sustaining the following interpretation rests largely on the canons of statutory construction already discussed in previous memoranda on this topic. While the statute contains an express provision of the time period to be considered, draft regulation 18450.2 presents in subdivisions (1) and (2) a different structure. In subdivisions (1) and (2) of proposed

regulation 18450.2, staff has drafted language limiting the time period applicable to the "cumulation" of contributions as it applies to sections 84503 and 84504.⁴

Decision 1 provides alternate language to limit the scope of the term "cumulative contributions." Staff has presented the Commission with a choice of 12 months or 24 months for cumulating contributions. It can be argued that the 24-month time frame seems best suited to "capturing" the information about "big money" contributors. It can also be argued that a 12-month time frame is more consistent with the statutory scheme because such a time frame is set out as mandatory in section 84506, dealing with independent expenditure disclosures. It was thought that having one time frame for aggregating contributions, regardless of which disclosure section is applied, might simplify the advertising disclosure scheme.

The options in **Decision 1** of this regulation also work well with the record keeping requirements outlined in section 84104 and regulation 18401. "Still another rule of construction calls for the harmonizing of statutory provisions, if possible." *Fuentes v. Workers' Comp. Appeals Bd.* (1976) 16 Cal.3d 1, 7. Currently, the Commission requires records be kept four (4) years for disclosure purposes. It is possible that a committee might not have records dating back to when the statement of organization was originally filed, making it difficult, if not impossible to comply with section 84502.

C. Regulation 18450.1 – Definition of "Advertisement."

Section 84501 defines the term "advertisement," which circumscribes the scope of the advertising disclosure scheme set out in sections 84503-84511 by laying the basic foundation for what is being regulated. This definitional section also contains a subdivision excluding certain items and communications from the basic definition of "advertisement."

The Commission directed staff to take a "laundry list" approach rather than attempt the daunting task of defining the term. Accordingly, draft regulation 18450.1 describes several groups of materials that are an advertisement under section 84501. In its last examination of the regulation, the Commission decided to await further input from the Internet commission before proceeding to regulate electronic mail and websites. Accordingly, subdivision (b)(3) excludes such materials from the ambit of the statute.

With respect to thresholds, the Commission determined to apply a uniform threshold of "200" to the various provisions regarding the numbers of items produced that bring them within the ambit of the statute.

Staff Recommendation: Staff recommends the Commission **adopt regulation 18450.1.**

⁴ The Commission already determined that the \$50,000 contribution threshold of section 84504's committee identification requirements was a *cumulative* threshold.

Exhibits:

1. Proposed Regulations
2. Table of Advertising Disclosure Statutes